No. 3385

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA
Defendant in Error

Petition for Rehearing of Plaintiff in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon

JOHN McCOURT and
CHARLES H. CAREY
Attorneys for Plaintiff in Error

No. 3385

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS
Plaintiff in Error
vs.
THE UNITED STATES OF AMERICA
Defendant in Error

Petition for Rehearing of Plaintiff in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon

In applying for a rehearing in this case, we submit our suggestions with a deep sense of the importance of the question discussed, not only as respects this defendant but to the country. The issue is one that involves the liberties of the people, and the rule now adopted will either open the door to the encroachment upon valued rights and make future prosecutions for political offenses the means of oppression, or will reassert the time hon-

ored principles of law long recognized as the safeguard of the rights of persons accused.

Our country has been passing through a period of war when patriotism was at white heat and men's passions and prejudices were strongly excited. But as Judge Pritchard said in the Hall case (256 Fed. 752):

> "In a time like this when patriotism is at a high pitch, and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense affecting the welfare of the government."

The crisis is over. The country is now rapidly returning to the paths of peace, and the excitement and strain of the war period relaxes. We can now view with calmness, and discuss with candor and without passion or prejudice, questions of historic fact that are already taking proper place in the perspective of the past. And in the application of legal principles to specific cases a time has come when advocates at the bar may temper their enthusiasm in their clients' interests, while judges in the courts, as well as teachers and students of the philosophy and the theory of the law, may survey the recent past and satisfy themselves that the war has not changed the fundamental rules long established for the protection of persons accused. In the evolution of the common

law it is to the courageous judges that liberty owes its protection. The rules of evidence in criminal cases have often been established by great judges in defiance of governments and in spite of the argument of expediency. One of these rules is that which confines the evidence to the exact offense charged in the indictment and the variation and exception to this rule that is sparingly permitted in certain circumstances is limited, as indeed it should be if prosecutors are to be held within bounds and accused persons, especially persons accused of political offenses in times of stress and prejudice, are to have any protection.

Since the opinion of the court in the Albers case we have again examined the origin and history of the exception to the general rule above referred to, and have read carefully as many reported cases as the time has permitted. We respectfully submit this memorandum, believing that it may aid the court. We are firmly convinced that the Albers case extends the boundary of the law and will be dangerous to liberty as a precedent.

1. "OTHER STATEMENTS" IN THE ALBERS CASE.

The other statements attributed to Albers were thus described in the opinion:

> "There was, however, upon that vital and close question of intent, introduced in evidence testimony of two witnesses, David McKinnon

and Henry Cerrano, the former of whom was permitted to and did testify, among other things, that a few months after the beginning of the war, fixing the time as September, October or November, 1914, he met and had a conversation with the defendant on a street in the City of San Francisco, California, during which the defendant brought up the subject of the war, asking the witness what he thought of it, to which the latter replied that he did not wish to have much to say about it, was very sorry it had occurred, and thought it too bad that national disputes could not be settled in other ways than by bloodshed, whereupon the defendant said to the witness:

'What do you think of our British cousins?' To which the witness replied, 'No British cousins of mine nothing of British who are cousins of mine.' That the defendant then said to the witness: 'Never mind; before we get through with them we will kill every man, woman and child in England.'

The witness Cerrano was permitted to and did testify, among other things, that he was janitor of Albers Brothers (of which company the defendant was the head), and that some time prior to October, 1915, he was cleaning windows in the office of the company when the defendant entered with a German-American paper and gave it to a young man who was working in there, saying:

'Look at that paper See what the German army is doing. The German army is doing wonderfully and France and England come very easy'; and added: 'One kaiser and one God.'"

We would add also that there was an opinion testified to by Cushing (254) who said that he had a conversation with defendant shortly after declaration of war between Germany, France and Great Britain, and said: "He offered to bet witness one thousand dollars to fifty cents, and would loan witness the fifty cents, that the kaiser could lick the world."

We would also call attention to the fact that there were no other statements of a continuing character or acts of any kind in the evidence between the dates above indicated and a month before the close of our war, October 8th, 1918; and the statements were not accompanied by any evidence of any kind (excepting the drunken talk on the latter date) that showed or tended to show that defendant adhered to the views therein expressed in the interval or during our war, or showed or tended to show that they were in any manner connected with the crime charged in the indictment.

2. THE ADMISSIBILITY OF "OTHER STATEMENTS."

The opinion, in discussing this evidence, says: "The question is, was it too remote?" and proceeds to show that in the Equi case other statements and acts two years prior to the act and speech charged in the indictment were held not too remote.

We shall not argue the question of what lapse of time is necessary to make other statements too remote. We will assume that this must necessarily be more or less a judicial question to be determined in the exercise of a wise discretion, although the Albers case seems extreme in this particular. We find in such decisions generally such expressions as "about the same time," "at or about the same time," "closely connected in point of time," and the like. The interval of time in the Albers case is longer than in any reported case that has come to our attention, and is particularly exceptional in that there was no connecting series of similar circumstances during the interval. Statements made in 1914 and 1915 by Albers were not part of a continuing series of similar statements to the date laid in the indictment.

But our criticism of the Albers case does not rest here.

Our point is (and we respectfully urge that the opinion does not touch upon this most vital point) that the remoteness or irrelevancy that should exclude these other statements lies chiefly in the fact that they are not germane to the matter charged in the indictment.

3. STATEMENTS MUST BE GERMANE AND RELEVANT.

The earlier statements were manifestly not made with "the intent to incite, provoke or encour-

age resistance to the United States," for the United States was not mentioned nor was the United States at war. The expression of hostility to England, or even of admiration of the German army or the German kaiser, prior to our being in the war, cannot by any conception be deemed "like" or "similar" statements that would show intent or state of mind upon a wholly different subject after the country is at war. The indictment charged that the defendant "uttered language intended to incite, provoke, and encourage resistance to the United States."

The question of remoteness, therefore, is not a question of time only, as discussed in the opinion. This is a case where totally incongruous and unrelated statements are admitted under the mistaken assumption that they are like or similar statements, and in this we think the opinion has enlarged upon the exception to the general rule against other acts and offenses. This opinion is revolutionary, if we may be permitted to use a word which will not be considered extreme after the examination of the authorities; or perhaps we should rather say that the court has had its attention fixed upon the question of remoteness in point of time and has inadvertently overlooked the other and more essential requirement of all decided cases, including the Equi case itself, that the admitted other statements or other acts must be (1) other

criminal offenses of like character to the one charged, or (2) other acts or utterances showing or tending to show an intention or tendency to commit the specific crime charged in the indictment. These two classes will be found to cover all of the heretofore decided and reported cases in which this exception to the rule of relevancy has been allowed, and of course although it is now well settled that the espionage cases are cases where the exception is authorized, it will not be forgotten that the group of crimes embracing a class where the exception is authorized is jealously limited and guarded by the courts in the interest of common justice.

Now when the Albers other statements were made there was not only no espionage act and hence no possibility of "an offense of like character" under that act, but the war between Germany and the United States was not in existence. It was after those statements in fact that President Wilson was reelected on the "He kept us out of the war" slogan. The other statements therefore by no human conception can be said to fall into the second class of statements showing or tending to show an intention of committing the crime charged in the indictment, an essential ingredient of which was as there alleged "the intent to incite, provoke or encourage resistance to the United States."

That intent was the intent mentioned by the trial court in its instructions to the jury upon this very evidence, *"to show the bent of defendant's mind and his attitude as between this country and Germany."*

It is expressed in the opinion of the learned and conscientious judge who spoke for the Court of Appeals in this way:

> "In admitting the testimony the court distinctly ruled that it was admitted as tending to show the bent of *the defendant's mind and his attitude as between the United States and Germany*, with a view to enabling the jury to determine the defendant's real intention in saying and doing the things with which he was charged, and for that purpose only; and in its charge to the jury the court also specifically and clearly so limited it."

In these judicial expressions both trial and appellate court have realized that the defendant's attitude as to the United States is the crucial test, but both have assumed without deciding it that a pro-German attitude of mind in 1914 might or could indicate an anti-United States attitude of mind then or afterwards.

Our claim is, therefore, that error was committed in admitting these statements:

(a) Not because we were not then at war with Germany, but because they did not show or tend to show hostility to the United States or to obstruct its purposes.

(b) Not because the espionage acts had not yet made acts and utterances crimes, but because these other statements did not relate to any crime defined in the subsequently adopted statute or tend in any way to show what the attitude of defendant's mind would be as to committing any such crime.

(c) Not because in point of time the statements were remote, but because as related to the things described in the indictment they were both remote and irrelevant, having nothing whatever to do with the condition of war between the United States and Germany or the attitude of mind or possible intention of defendant should such condition arise.

4. A REVIEW OF THE RECENT CASES.

We propose now to present a review of the espionage cases reported in the Federal Reporter bearing upon this exception to the rule of evidence, and to show not only the limit heretofore recognized, but that the decision in the Albers case is unsupported by authority. We have examined many English and American authorities of the earlier periods, especially those collected by Judge Gilbert in the Schulze case (259 Fed. 189), and have examined the authorities cited by the various courts whose opinions are reviewed in this brief. It is manifestly impossible to analyze all of these authorities in such a brief as this, but we have

found no case, English or American, that extends the exception relating to "other crimes" or "other statements" or "other acts" so far as the Albers case.

Under these circumstances the court will recognize that counsel feel that the importance of the case as a future precedent justifies our asking a new consideration of the point, and a discussion by the court of the principles involved. It by no means satisfies to dispose of such an important question in criminal jurisprudence by a general order that a rehearing is denied, or to have the opinion make reference to the Equi case as controlling in relation to the lapse of two years of time between the "other statements" and the time of the commission of the alleged offense. We know that the Equi case and the Albers case were in the courts at the same time and the decision of one may have influenced the decision of the other; but they are totally unlike, excepting that both arise under the espionage act.

CIRCUIT COURT OF APPEALS—FIRST CIRCUIT.

In the Coldwell case (256 Fed. 805, 811) the circulars admitted in evidence contained advice "not to register, and against conscription." This went to the very heart of the indictment, which was for obstructing the recruiting and enlistment service of the United States by means of an oral speech of like character at a public meeting.

CIRCUIT COURT OF APPEALS—FOURTH CIRCUIT.

The Kirchner case (255 Fed. 301) does not set out the particular "other statements" of similar character that were held admissible, but the indictment itself charged "certain false statements *regarding the United States Government, the army of the United States, the bonds of the United States*, then being offered to the citizens of the United States," etc. The opinion of Judge McDowell simply says on the point in question (p. 304):

> "It is next urged that the trial court erred in admitting evidence of statements *similar in nature* to those set out in the indictment, made by the defendant in the Southern District of West Virginia and before the espionage law was enacted."

If "similar in nature" the statements must necessarily have been regarding the United States Government, or the army of the United States, or

the bonds of the United States. They could not have been of similar nature if they related to England or to Germany before the war and were not statements of the kind or character described in the indictment.

In the Hall case (256 Fed. 748) under four counts in an indictment covering making and conveying false reports with intent to interfere with the military operations of the United States; attempting to cause insubordination in the military and naval forces; obstructing recruiting and enlistment; and making false statements and false reports with attempt to obstruct the sale of bonds, the Circuit Court of Appeals held that threats made against the President and expression of desire to get an opportunity to put a bullet through Woodrow Wilson's heart, were not admissible. Yet as these expressions related to the President of the United States, they would evidently be less remote and much more likely to show an intent than the expressions attributed to Albers relating to England and Germany showing no hostility to the United States or its officers.

CIRCUIT COURT OF APPEALS—SEVENTH CIRCUIT.

In the Kammann case (259 Fed. 192), the indictment contained twenty counts under the espionage act. Ten counts set forth statements willfully

made with intent to interfere with the operation and success of the military forces of the United States; the other ten alleged that the same utterances were wilful attempts to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces. In that case it was held that expressions of defendant before the United States was at war, though showing a siding with Germany as against the Allies, was error.

On the question of admissibility of other statements, we quote the following pertinent language of Judge Baker:

> "It is unnecessary in this case to measure the limits of the admissibility of evidence of prior acts or utterances similar to the acts or utterances charged in the indictment, as discussed in 1 Wigmore, Secs. 300-306, 3 Greenleaf (15th Ed.) Sec. 15, 1 Jones, Sec. 144, 16 Corpus Juris, 586, and 7 Ency. of Evidence, pp. 629, 633; for the gist of the indictable offense here was the criminal intent to interfere with our military operations or to cause insubordination among our military forces. While we were neutral, Kammann's 'mental attitude,' as the trial court characterized the effect of this evidence, was no more an offense than was the 'mental attitude' of other American citizens who expressed their belief in the cause of the Allies. Of course no one can lawfully be convicted under the act of June 15, 1917, merely on account of his 'mental attitude' (proven necessarily by his expressions) since that date. But if there was a *prima facie* case to go to the jury, it is apparent how damaging it would be to allow a close or doubtful

case to be bolstered up with proof of expressions which are not fairly attributable to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces as proof of an intent to violate those commands of the espionage act when it should come to be enacted. That would virtually be giving an *ex post facto* effect to the statute itself.'

"We hold that the evidence of Kammann's expression while we were neutral, though showing a siding with Germany as against the Allies, could not fairly be attributed to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces, and its admission was prejudicial error."

COURT OF APPEALS—EIGHTH CIRCUIT.

The circulars admitted as "other acts" in the Doe case (253 Fed. 903) were of "similar import" to the one set out in the indictment. "The circulars other than the one set forth in the indictment were circulated about the same time as the former," and were offered for the purpose of showing intent.

The Heynacher case (257 Fed. 61) relates to the admission in rebuttal by the government of a statement in a letter of the accused, which came in as part of the cross-examination of the defendant. This case has no bearing upon the question now under discussion.

In the Wolf case (259 Fed. 388) evidence of prior statements was rejected. The court said:

> "Ordinarily such statements made only a few weeks prior to those covered by the indictment would be evidence bearing on intent, since it would tend to show his state of mind, which is presumed to continue. *But it cannot be presumed that a state of mind entirely lawful at the time and not accompanied by expressions showing a willingness to violate law, will change into a criminal intent under a future statute.*"

The reported case does not quote the words under consideration, but if they included a denunciation of the United States or tended to cause disloyalty or to obstruct recruiting as laid in the several counts of the indictment they would be admitted under the rule of evidence adopted in this Circuit even though uttered before the espionage act was in existence; but certainly if they did not either mention the United States or relate to any crime charged in the indictment they ought to be excluded in any view of the law.

CIRCUIT COURT OF APPEALS—NINTH CIRCUIT.

The syllabus in the Rhuberg case (255 Fed. 865) states this point therein decided:

> "On trial of a defendant for violation of espionage act, Sec. 2 (Comp. St. 1918, Sec. 10212c), by making statements intended and calculated to obstruct the recruiting and enlistment service, evidence of statements made by him before the United States was at war, tending to show his attitude toward Germany

and this country, and limited to that purpose, *held* properly admitted."

An examination of the statements and the indictment show that the former related to the very charges of the indictment, and were indeed like statements. They included the following:

> "He then said that Germany was perfectly right in sinking the Lusitania; that ships carrying contraband of war, with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war Germans in this country would rebel against this government; that this country was in no shape to fight the German government; that we were so slow that Germany would have the Allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win; that the German government always took the right side to everything; that they never lost a war, and they never would."

These statements though made before the war are totally unlike the Albers statements in showing the defendant's attitude as hostile to the United States and its policies as charged.

In the Shafer case (255 Fed. 886) the evidence showed that numerous identical books were mailed, one copy of which was referred to by description in the indictment. The evidence of the mailing of other copies seems to have been received without reference to the question here under discussion,

as of course it should have been in any view of the rule of relevant other acts, and the case therefore has no bearing.

In the Herman case (257 Fed. 601) the circulars, pamphlets and correspondence and the oral statements admitted in evidence in a prosecution for publishing a false circular to interfere with the operation and success of the military and naval forces of the United States, related directly to the matter charged in the indictment. The court remarked as to the admitted oral statements that this evidence "all tended to show the mental attitude of the defendant and had its bearing upon the question of his intent," and while these statements are not quoted in the opinion it may be assumed that like the circulars, pamphlets and correspondence admitted they related directly to the particular charge in the indictment, namely, interfering with the operation and success of the military and naval forces of the United States or promoting the success of the enemies of the United States. No one can read the carefully guarded language of this opinion without perceiving the vast difference between this case, where the admitted evidence *related to the exact crime charged in the indictment*, and the Albers case where the admitted evidence does not relate to the United States at all or to any charge in the indictment.

The report in the Shidler case (257 Fed. 620)

does not disclose the words of the statements that were admitted in evidence, but the indictment covered a wide range in four counts, and it must be assumed that the statements did relate to one or more of the crimes charged.

The Sandberg case (257 Fed. 643), while not in point as to "other statements," relates to statements made by the defendant showing strong bias in favor of Germany. These statements were held insufficient to sustain conviction under the act and are referred to here for purposes of comparison with the statements in the Albers case.

In the Schulze case (259 Fed. 189) other acts or words are held admissible to show defendant's attitude of mind and intent or purpose. The admitted other acts and words related to the crime charged and tended to support or favor the cause of a country with which the United States was at war, and to oppose the cause of the United States.

The citations collected in this opinion correctly state the rule and the exception, and certainly fall far short of sustaining the Albers decision.

The Equi case (261 Fed. 53) assumes a position of supreme importance in this list of decisions, for the reason that it is the only authority cited in the Albers opinion. In this opinion it is said:

> "It is manifest a like ruling must be made in the present case unless the Equi case is to be overruled, which we are not prepared to do."

But the Equi indictment covered several counts and the other acts and statements admitted on the trial related exactly and specifically to the very essence of the crimes so alleged. These other acts and statements were bitter attacks upon the United States:

(a) Actions of Dr. Equi on the occasion of the Preparedness Day parade, June 3, 1916, tearing up the American flag, carrying a "Prepare to Die" banner and a banner calling the soldiers scabs.

(b) Speeches of Dr. Equi at the Plaza Block, September and October, 1917, denouncing the army, the bond sale, and the war.

(c) Speech at I. W. W. Hall, June 1, 1918, opposing the war and advocating the red flag.

The first of these occurrences is the only one of the series that was before the war, and in the circumstance that it happened before the war began there is a certain resemblance to the Albers case, wherein statements made before the war were admitted. But there the similitude is at end. The actions, words and conduct of Dr. Equi on that occasion introduced upon the trial (as will be seen by reference to the appendix of this brief where excerpts from the brief of the United States attorney in that case are copied) showed a hostility to preparedness, to the army, the flag, and there-

fore to recruiting and enlisting an army for the United States, as charged in the indictment.

The indictment in the Equi case is fully set out in the report, and covered the very kind of acts and statements of that defendant that were held admissible on the ground that they were similar. Indeed, they were almost identical. They were so alike that by a change of date of the offense laid in the indictment they would read as the very acts and statements plead by the government. Their remoteness, if it existed, was in time and not in substance. The Equi case definitely holds that statements made two years prior to the acts alleged in the indictment are not too remote in point of time, and therefore may be considered as having occurred "at or about the same time" as the expression goes in this class of cases.

But although it is cited in the Albers case on that point as though controlling, we respectfully urge that the essential reason why the other statements in the Albers case should be excluded is not mere lapse of two years' time but a total lack of apposition or application, and a total lack of any intervening or connecting circumstance. Time, isolation and lack of application to the crime charged, all combined in the Albers case make the Equi case clearly distinguishable under the authorities.

The Albers statements showed no hostility to the United States, nor to its war, its flag, its en-

listment and recruiting, its army or navy, or to its cause, or to its officers, or to its government. On the other hand, the statements showed nothing from which anyone would be justified in saying that in case of war two or three years afterward Albers would be found an enemy of his chosen country; so it is not within the scope of the Equi case as a precedent.

True, the Equi Preparedness Day occurrence was before the United States was at war, as were the Albers statements. But the Equi occurrences were relevant notwithstanding, because they pertained to the subject matter of the crime and bear directly upon the indictment. The circumstance that they were before the war was to be considered in the same light perhaps as were the statements in the Kirchner case, where the statements were before the espionage act was passed. That would not agree with the principle elucidated in the very excellent case of *State v. Wenzell*, 72 New Hampshire 396, where it was shown that an illegal intent cannot be inferred from a previous legal act, but to go a step further as in the Albers case and to hold that non-criminal "other statements" uttered before the war, and before the statute was adopted, and that do not relate to the United States at all, may be considered by the jury upon a question of intent hostile to the United States, is to apply the Equi case where it is not an authority; it is to drag

in irrelevant, remote, isolated and unrelated previous declarations contrary to all precedent and in violation of the plainest principles of justice and law. And upon such a rule no defendant would ever be safe from unjust conviction.

In the Magon case (260 Fed. 811) evidence of other offenses, speeches and other publications of defendant, "unquestionably seditious and anarchistic," were held admissible on the question of intent; but they were each published by the defendant after the war began as a part of propaganda in which the anarchistic manifesto described in the indictment was published.

In the Partan case (261 Fed. 515) the other books and newspaper articles that were admitted were published and distributed after the United States and Germany were at war, and they seem to have been of like character to the publication described in the indictment.

SUPREME COURT.

In the Debs case, decided by the Supreme Court March 10, 1919 (U. S. S. C. Adv. Opinions No. 10, Apr. 1, 1919, p. 309), the "Anti-War Proclamation and Program" that was received in evidence was "coupled with testimony that about an hour before the speech the defendant had stated that he approved of that platform in spirit and in substance." The defendant referred to it in his address to the

jury seemingly with satisfaction and willingness that it should be considered in evidence, but his counsel objected, etc. The proclamation contained a recommendation of continuous, active and public opposition to the war, which was the very thing the defendant was charged with in the indictment. The court said:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time he made his speech (covered by the indictment) is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books."

N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 598, was a fraud case. The following quotation serves to show the true principle in many applications to civil suits:

> "The theory of the defense is, that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained, without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act. A creditor has an insurable interest

in the life of his debtor, and may very properly procure an insurance upon it for an amount sufficient to secure his debt, but if he takes out policies in different companies at or nearly the same time, and thus increases the insurance far beyond any reasonable security for the debt, an inquiry at once arises as to his motive, and it may be considered as governing him in each insurance. In *Castle v. Bullard*, 23 How. 172, 186, where the defendants were charged with having fraudulently sold the goods of the plaintiff, evidence that they had committed similar fraudulent acts at or about the same time was allowed, with a view to establish their alleged intent with respect to the matters in issue. The court said: 'Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration.' In *Lincoln v. Claflin*, 7 Wall. 132, an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. 'Its admissibility,' said the court, 'is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary v. Hotailing*, 1 Hill 311, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge.' In *Butler v. Wat-*

kins, 13 Wall. 456, 464, speaking on the same subject, this court said: 'In actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit.' In *Bottomley v. United States,* 1 Story 135, 144, Mr. Justice Story held the same doctrine, and cited several instances of its application.

"Thus, in the case of a prosecution for uttering counterfeit money, the fact that the prisoner has in his possession or has uttered, other counterfeit money, is held to be proper evidence to show his guilty knowledge; and upon an indictment for receiving stolen goods, evidence that the prisoner had received at various other times different parcels of goods which had been stolen from the same persons is held admissible in proof of his guilty knowledge. So, on an indictment for a conspiracy to create public discontent and disaffection, proof is admissible against the prisoner that at another meeting held for an object professedly similar, at which the prisoner was chairman, resolutions were passed of a character to create such discontent and disaffection. 'In short,' said the learned justice, 'wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act.' Many other authorities might be cited to the same purport.

"The evidence offered that Hunter obtained insurances in other companies on the life of Armstrong at or near the same time was, under these authorities, clearly admissible. It tended to establish the theory of the defendant that the insurance in this case was obtained by Hunter upon the premeditated purpose to cheat and defraud the company. Especially would it have had that effect if followed by proof of the manner of the death of Armstrong."

CASES NOT UNDER THE ESPIONAGE ACT.

In *Byron v. U. S.*, 259 Fed. 371, which was a case of using the mails to defraud, evidence that another similar plan was carried out by the defendants was offered. This evidence was admitted solely for the purpose of aiding the jury in ascertaining the intent of the defendants in their conduct in the case on trial. For that purpose and under such limitations it was competent. But it will not be necessary to call attention to the fact that the plan was similar to that laid in the indictment.

In *Riddell v. United States*, 244 Fed. 695, a case of using the mails to defraud, a continuous scheme was shown, and it was held that outlawed similar acts of criminal character might be proved. It will be noticed that in this and in each of the several cases cited and relied upon in the opinion the similar acts were of a criminal character like those charged, and none of them goes so far as to hold

that a criminal intent can be inferred from a lawful previous act or statement.

The Byron case, *supra*, cites the Hallowell case (253 Fed. 865), also a postoffice case. The letters were held to be admissible, "as not foreign to the scheme so charged" (in the indictment) and as containing statements tending to prove the criminal conspiracy, as well as to prove intent. But on the latter point the relevancy of the letters to the crime charged is the very basis of the legal principle on which they were to prove intent, or otherwise they would not have been relevant to the indictment.

This was also the situation of letters received in the Farmer case (223 Fed. 903, 911), which were admissible as showing intent and casting light upon the methods of the scheme devised and described in the indictment.

And in the Stern case (223 Fed. 762, 764) "the other transactions proved were in the same business and done in the same way with the same result."

The other statements admitted in the Sprinkle case (141 Fed. 811) were part of the *res gestae* of the alleged crime, and all of the facts and circumstances, including the acts of the accused, were admissible on the question of intent, but the court took care to say that "they should, of course, be the necessary incidents of the litigated act."

And finally, in the Shea case (236 Fed. 97), the exact point is beautifully illustrated by the contrast of evidence of like criminal acts of same character closely associated in point of time and circumstance which was admitted on the question of intent, and other criminal acts which were held inadmissible because not restricted to the consideration of intent. The second fraud shown by the evidence in that case was "of an entirely different nature than that charged in the indictment, and was thus directly within the general rule which forbids proof of the commission by defendants of crimes distinct and independent of the crime charged." All of which seems to make clear that "other acts" that are not of a criminal nature at all, and which do not relate to the particular act charged, are even less to be considered relevant or admissible upon the question of intent to commit the offense charged in the indictment.

In the case of Kettenbach (202 Fed. 377), arising under the National Bank Act, other transactions of similar character were admitted to show motive and intent. This evidence tended to show a uniform system of annual reports similar to the falsification of the reports which was charged in the indictment. The admissibility of such evidence is not doubted as it was evidence of transactions of the kind alleged in the indictment and sought to be proved by the government.

It is not our purpose to extend this brief by a review of cases from the state courts. We quote, however, from one such:

> In *Paulson v. State* (118 Wis. 89) the Supreme Court of that state had occasion to decide that evidence of former crimes attributed to the accused were not admissible. In discussing the legal principle, the court said:
>
> "An exception is indulged where other crimes are so connected with the one charged that their commission directly tends to prove some element of the latter, usually guilty knowledge or some specific intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. *It obviously can have no application to such remote and disconnected facts as those here presented. The cases in which overzealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number.*"
>
> In that case the court says that the examples cited are not given so much to establish the rule that evidence of such remote acts is irrelevant and therefore inadmissible, as to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged, when their minds have been prejudiced by proof of bad character of the accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt. The court adds:
>
> "In a doubtful case, even a trained judicial mind can hardly exclude facts of previous bad character or criminal tendency and prevent

its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."

CONCLUSION.

We must own that we are disappointed that in the opinion the court did not see fit to discuss the point made in the brief as to the necessity of appropriate allegations in the indictment to show that the words charged therein were in the German language, with translation. (See the indictments in *Balbas v. United States*, 257 Fed. 17, and *Magon v. United States*, 260 Fed. 811, recent decisions not cited in our former brief on this point.) And also that the court did not take the responsibility of deciding that the circumstances under which the words set out in the indictment were uttered make it inconceivable that the statutory intent could exist. On the latter point may we ask if the court has considered that the testimony of the government's own witness (Gaumont, p. 101-2) showed that *before these utterances were given by the defendant the latter was so drunk that it was suggested that he should be put to bed.* We beg the court to reconsider the case upon this point. The court in its opinion has said:

> "No one, we think, can read the testimony of the running conversations which occurred in the smoking compartment of the Pullman car, between the defendant to the indictment and the other persons therein named, and in

> which conversation the prohibited and disloyal words were spoken by the defendant, in connection with the further undisputed fact that the latter had ultimately to be assisted by the porter of the car to his berth and put into the bed with his clothes and shoes on, without seeing that he must have been very drunk."

And while the court says that whether he was too drunk to know or realize what he said when he uttered the prohibited and disloyal words was the real question in the case, it has, notwithstanding Gaumont's testimony, been content to abide by the decision of the jury that there was and could have been an illegal intent in uttering the words. If this is because it is deemed that the court is bound by the obviously prejudiced verdict where there was a controverted question of fact, then we take the liberty of calling attention to the Herman case (257 Fed. 601) and the Doe case (253 Fed. 905) to show that the Court of Appeals may and should see that an unjust verdict does not stand.

To quote from the Doe case:

> "The question of the sufficiency of the evidence to sustain a verdict of guilty on the count under consideration was not raised in the trial court but we are asked to consider it although not so raised. It is within the sound discretion of the court to notice the claim of counsel that there was no evidence to sustain the verdict of guilty although this question was not raised in the trial court." (Citing cases.)
>
> *Doe v. United States, supra.*

We take it that the opinion expressed by some of the government witnesses that Albers was not too drunk to understand and intend what he was saying is after all an expression of opinion, and there was little or no conflict of testimony on the real facts; and on the whole record, and considering Albers' history, the conclusion that such an utterly inebriated man had the guilty intent alleged in the indictment is incredible to unprejudiced persons.

At the expense of repeating what was perhaps sufficiently covered in our former brief and arguments, we ask again the court's particular attention to the testimony of the government witness Gaumaunt above referred to (pp. 101-2), especially the following passage:

> "Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain; yes, sir. He heard it plainly. After that remark was made he didn't participate in any conversation outside of asking Mr. Kinney who the man was, and didn't he think defendant better be put to bed. This was right after he made this remark. Witness said this right in the room in the presence of Mr. Albers. Nothing else took place, only Mr. Kinney said he thought—he didn't believe in putting a propagandist to bed, or something to that effect, and witness asked Mr. Kinney if he knew who the man was and he said he didn't."

This was corroborated by the defendant's witness Richard K. Clark, porter of the car, who testified that he saw Deputy Marshal Tichenor making his notes of the conversation just after he (Clark) had put Albers to bed. He also says that the Deputy Sheriff Gaumaunt furnished Albers with the liquor to incite him to make the objectionable statements. We quote as follows (pp. 175-177):

> "Mr. Albers had been drinking pretty heavy all day and that evening, after these men surrounded him, witness knew the condition defendant was in and he wanted to get his whiskey away from him, and so about 9 o'clock he went to try to get Mr. Albers to go to bed, and he took his grip from the washroom to his berth and after he had done this this man Gaumaunt came and said he wanted that grip. He said, 'I want that grip.' He says, 'There is something in it I want to get out of it.' Witness said, 'What do you want with it?' He says, 'Something in it I want to get out, something in there I want.' And witness said, 'What authority have you to want this man's grip?' He says, 'Well, I am an officer.' Witness said, 'Well, you will have to show me if you are an officer,' so in the meantime the Pullman conductor came along and witness says to the conductor, 'How about this man? He claims he is an officer and wants this man's grip. What shall I do about it?' The conductor said, 'Well, let him have the grip.' In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't

say anything at that time excepting that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full; get him full of whiskey. Witness thought that was all that he heard at that time. . . . When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when he put him to bed that night. He slept in his clothes, to the knowledge of witness, as far as he knows. He wasn't able to take his shoes off. Slept in his shoes. Witness saw Mr. Tichenor making notes after he put defendant to bed and after they had taken his grip back. He saw Tichenor making notes when he went and put defendant to bed finally —the last time. He was making notes then, yes, sir, writing it down. There was two or three of them with him. This man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man, three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor."

In the recent case *Skuy v. United States* (261 Fed. 316, 320), which, however, was a case that involved a different point of law, Judge Sanborn, speaking for the Court of Appeals, said:

> "And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception or assignment."

Albers has been unjustly convicted, and has been given a sentence that would be severe for a hardened criminal or a dangerous anarchist or enemy of the country. He appeals to the court not for mercy but for justice. If we have, as we believe, found a feature of his case not discussed or decided in the opinion, namely, the admission of dissimilar utterances under the rule that sometimes admits similar statements, we will hope that we may have a frank and candid expression and a judicial survey of the authorities. Numerous illustrations from these are collected in Thompson on Trials (1889 Ed.), Secs. 329-335, and quotations from many eminent judges stating the principle for which we contend would be given if space would permit, all of which may be summed up in the sentence of Chapman, C. J., in *Commonwealth v. Choate* (105 Mass. 451, 458): "The principle is, that all the evidence submitted must be pertinent to the point in issue."

Respectfully submitted,

JOHN MCCOURT and
CHARLES H. CAREY,
Attorneys for Plaintiff in Error.

APPENDIX.

(The following from the record of the Equi case is offered to show that the other acts and statements in that case related directly to the matter set out in the indictment and were therefore *similar*. Although a portion thereof occurred two years before the date laid in the indictment, it was a part of a series of similar occurrences after the war and after the adoption of the espionage act to and including the date in the indictment):

> "The indictment in this case charges a violation of section 3 of espionage act June 15, 1917, c. 30, tit. 1, 40 Stat. 219, as amended by act May 16, 1918, c. 75, sec. 1, 40 Stat. 553 (Comp. St. 1918, sec. 10212c). In general terms the charge is that the plaintiff in error on June 27, 1918, while the United States was at war with the imperial German government, at a public meeting in a hall of the Industrial Workers of the World in the city of Portland, state of Oregon, in the presence of certain persons named and a large number of other persons to the grand jurors unknown did willfully, knowingly and unlawfully, and feloniously state in substance and to the effect as follows, to-wit: . .
>
> "(1) That she (meaning the said defendant) and all of her fellow workers (meaning the members of the Industrial Workers of the World) were not fighting for the flag containing the *red, white and blue*, nor the British flag, nor for a flag of any country, but that the fellow workers and the I. W. W. platform (meaning the members and platform of the Industrial Workers of the World) stood for the

industrial flag, the red banner that stood for the blood of the Industrial Workers.

"(2) That the ruling class had been in power long enough, with the law and the army and navy behind them, and that they (meaning the members of the Industrial Workers of the World) knew that there were fellow workers pulled into the army against their wills, and were placed in the trenches to fight their o brothers and relatives.

"(3) That the members of the Industrial Workers of the World were clean fighters, and not like the dirty, corruptible scum of the army and navy.

"(4) That it was against the I. W. W. platform (meaning the platform of the Industrial Workers of the World) to injure or kill another fellow worker, but if it was necessary to do this, to gain their rights, that she for one, and every man or woman packing a red card (meaning a membership card in the Industrial Workers of the World) would be willing to sacrifice all they had, their life, if need be, for the cause of industrial freedom.

"(5) That the Irish revolutionists now had a chance to throw off their master (meaning the kingdom of Great Britain and Ireland), while he was weak and unable to stop them, and that the Irish were taking advantage of this condition, and were asserting their rights, and that the I. W. W.s (meaning the members of the Industrial Workers of the World) should do likewise."

"The indictment contains eight counts in all, but a verdict of not guilty was directed by the court as to counts 1, 4 and 8. The second count charges that the foregoing statements were calculated to and intended to cause and attempt to cause, incite and attempt to

incite, insubordination, disloyalty, mutiny and refusal of duty within and among the military and naval forces of the United States. The third count charges that the statements were made with intent to prevent, hinder, delay and obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States. The fifth count charges that the statements were made, and consisted of disloyal, profane, scurrilous, and abusive language about the military and naval forces of the United States, and were made with intent, and were calculated to and intended to bring the military and naval forces of the United States into contempt, scorn, contumely and disrespect. The sixth count charges the same with reference to the flag, while the seventh count charges that the language was calculated and intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies."

The following is an excerpt from brief of defendant in error in case of Marie Equi v. U. S., pages 41-44:

"Admissibility of Testimony.

"It is further contended that the court erred in admitting in evidence certain testimony relative to the actions and statements of the defendant upon other occasions than those charged in the indictment, and in particular, assigns as error the admissibility of that testimony relating:

"(a) To the actions of the defendant upon the occasion of the Preparedness Day parade in Portland, Oregon, on June 3, 1916.

"(b) To the speeches of the defendant at

the Plaza Block in Portland, Oregon, in September and October, 1917, and

"(c) To the speech of the defendant in the I. W. W. Hall at Portland, Oregon, on June 1, 1918.

"In a prosecution for violation of Section III of the espionage act, it is clearly incumbent upon the government to prove, not only that the defendant spoke the words charged in the indictment, but that she spoke them with the specific intent attributed to her in the separate counts of the indictment. . . .

"With the testimony admitted for this special purpose only, the court admitted in evidence, under appropriate instruments, the following testimony:

"(a) Preparedness Day Parade (June 3, 1916).

"Palmer Fales testified that he is an attorney at law residing in the City of Portland; that he was a participant in the Preparedness Parade at Portland on June 3, 1916, marching with the lawyers contingent; that while that body was forming into lines in the neighborhood of Fourteenth and Hall Streets, waiting to march in the procession, he noticed the defendant come in an automobile, in which automobile she carried a banner bearing this legent, or words to that effect: 'Prepare to die,' also another legend that Morgan wanted the war for profit. This banner was about three or four feet long and probably two and a half feet high. (Transcript, page 92.)

"Raymond Sullivan testified that he is an attorney at law residing in the City of Portland and that he was a participant in the Preparedness Parade on June 3, 1916; that he marched with the Knights of Columbus organization; that he first saw the defendant in an

automobile passing ahead of his column; she was then standing up in the car carrying a banner; that he is not positive as to the legend the banner bore, but that it had some reference to Rockefeller and the soldiers, some statement to the effect that soldiers were 'scabs'; that he noticed her returning a little later, but that this time she was not holding up any banner; that her automobile stopped right in front of his column; whereupon a young man by the name of Crowley rushed out and handed her an American flag; that she took the flag, held it up in front of her and tore it into strips. (Transcript, page 99.)

"Thomas F. Crowley testified that he was a soldier in the United States Army, having entered the service on July 25, 1918; that at the time of trial he was stationed at Camp Lewis, Washington; that prior to that time he was a resident of the City of Portland; that he was a participant in the Preparedness Day Parade in June, 1916, marching with the Knights of Columbus division; that while they were in the parade, or waiting to take part in it, he saw the defendant proceeding along in an automobile: that she was standing up in the automobile carrying a banner bearing the legend: 'Prepare to Die'; that he first noticed her going by the column and then a little later coming back; that his company opened ranks to let her go through, when she started to talk about some 'dirty curs' taking her banner away, whereupon the witness handed her a small American flag, saying, 'Here, I will give you a good banner'; that the defendant thereupon said: 'To hell with you and your banner.'

"This testimony was admitted solely for the purpose of proving intent and was received by the court for that purpose only, and in his

instructions to the jury, the court specifically pointed out the purpose for its introduction and how it was to be considered by the jury. (Trans. pp. 144-5.)

"(b) Speeches at Plaza Block (Sept.-Oct., 1917):

"Testimony of certain speeches made by the defendant on the public streets of the City of Portland, at a place known as the Plaza Block, was likewise offered by the government and admitted solely for one purpose, to show the bent of mind and attitude of the defendant, and to thereby aid the jury in determining her purpose and intent in using the language attributed to her in the indictment, in the event the jury was to find such statements were actually made by the defendant.

"With the effect of this testimony thus limited, the court admitted in evidence the following testimony relative to the speeches made by the defendant at the Plaza Block in September and October, 1917:

"John Anderson, a resident of Portland, testified that some time in September, 1917, a military funeral was proceeding south on Third Street outside the Plaza Block in the City of Portland and that some soldiers were marching on each side of the casket; that at that time the defendant was addressing a crowd in the Plaza Block on the corner of Fourth and Main Streets and that while the funeral cortege was passing, the defendant made these utterances as testified to by the witness:

"She pointed at the funeral and said, 'There they go; that's nothing to be proud of, those skunks.'" (Trans., p. 85.)

"The witness further testified that some time in October, 1917, during the second Liberty Loan drive, the defendant was again ad-

dressing a crowd at the Plaza Block and was discussing an advertisement appearing in the Oregonian, wherein one William McRae of the Bank of California, acting for the clearing-house, was offering to lend money to buy bonds; that she commented upon the fact that the banker was not very patriotic, calling him a capitalist and hoped that her hearers were not going to fall for that sort of 'dope'; that she thereupon made the following statement:

" 'This is a rich man's war; it ain't any war for you. We have no quarrel with these German people over there and we have no right to go over and shoot them.' (Trans., p. 86.)

"Dr. J. P. Allen testified that he heard the defendant address a crowd in the Plaza Block in September, 1917, at a time when a military funeral was proceeding along the street, and on that occasion he heard her make remarks concerning it during which she called the mourners, wearing the uniform of the United States soldiers, 'a lot of dirty skunks.' (Trans., p. 90.)

"The witness further testified that in October, 1917, he also heard her deliver a talk at the Plaza Block; that it was during the second Liberty Loan campaign; that she was holding an advertisement appearing in the Oregonian wherein the California State Bank was offering to lend money at 5 per cent to buy bonds, and in referring to this advertisement she asked the 'boys' if they were going to fall for that kind of 'dope'; that on that occasion she also made this statement:

" 'This is not our war—this is the capitalists' war. You can see by the way the bankers are advertising them, want you to pay them more interest than you are getting.' (Trans., pp. 90-1.)

"Russell E. Butler, a police officer of the City of Portland, testified that in the month of September, 1917, he was directed by the Chief of Police to report the I. W. W. meetings at the Plaza Block and to make notes of any seditious utterances against the government; that on three different occasions in the months of September and October, 1917, these meetings were addressed by the defendant, all of which meetings he attended. Among the statements alleged to have been made by the defendant during her speeches on those occasions as testified to by this witness were the following:

"'She spoke about the war, said she was for the war, she wanted to know what the war was for. It was soon after Mr. McAdoo had been here and she spoke about the buying of Liberty Bonds, and that the banks didn't take them any too readily, and wondered why the poor fools—the usual expression was, "Why should you take them, boys?"'

"'And she spoke about the soldiers and said one particular soldier, whose name I don't remember, that is, an ex-soldier, had been arrested as an I. W. W.; said that he had served his entire life in the army, and they had arrested him and put him in jail because he couldn't fight any more. And said considerable about the shipyard strike, and claimed that they had a right to strike then, as war was coming on. Another occasion where she spoke about the army, she said that the ruling class didn't go to war, it was the working class that went to war, and she said: "When you get over there in the trenches, boys, you know who gets stabbed in the guts with the bayonets," and that is about all that I recall at the

present time, the exact words.' (Trans., pp 78-79.)

"Dan Kellaher, a police officer of the City of Portland, testified that on October 14, 1917, he was directed by the Chief of Police of Portland to report any disloyal utterances that might be made by the speakers at that meeting; that the principal speaker at that meeting was the defendant; that there was an audience of a couple of hundred people; that during the course of her remarks she made reference to the Preparedness Parade held in Portland in June, 1916, stating in substance as follows:

" 'They wanted me to kiss that dirty little rag, the American flag, and I would not do it. I would not kiss any flag. Then he said he would thrust it down my throat, but he did not.' (Trans., p. 63.)

"The witness further testified that she also referred to the Liberty Bonds and that the bankers were a little bit shy in subscribing to them, concerning which she made the following statement:

" 'They are pretty wise and they know what they are doing. No, they want you workingmen to take a chance with them.' (Trans., p. 64.)

"The witness further testified to other excerpts from her speech which had been made the subject of a typewritten report by him and to which he resorted to refresh his recollection. In the course of her speech, she stated as follows:

" 'James McDonald made one mistake in life. He served his life for the United States Army until he became physically disabled and they didn't want him any more, and he is not present now because he can't fight. Remember that, boys.

" 'The crowning disgrace is to think that they will take working men to the trenches to fight for them and then try to break up their organizations. What are we fighting for? That is what I would like to know. McAdoo made an appeal while he was here for the working class to buy Liberty Bonds and told them how they could pay so much down and so much a month. Why don't he say to the Dupont Powder Works, who have made sixteen million dollars last year, to divide 50 per cent with the government? No, he won't do that, but they want you workingmen and your son to put on a uniform. He said the bankers were a little bit shy about the Liberty Bonds. These fellows are wise and are supposed to know what they are doing, then why should the working men have to take a chance with them? . . . We have got to get busy and do our little bit to bring about democracy. That's why I am out here. And now they call you unpatriotic. For what? For daring to strike during the war; for daring to have the courage of your convictions in asking for a living wage and better working conditions. The capitalistic class has forced good women to sell their bodies, but their tools, the editors of the papers and the lawyers, they sell their brains and that is a damn sight worse—you will excuse me—they prostitute their brain power for a price. . . .' (Trans., p. 170.)

"Charles Porter, a police officer of the City of Portland, testified that he was directed on October 14, 1917, to report a meeting addressed by the defendant at the Plaza Block and that on that occasion he heard her speak to a crowd of some two or three hundred people and that she was speaking about the war, enlistments and of the ruling classes and that during the

course of this speech she made use of the folloing utterances:

"'It will be you fellows that will get the bayonets in your guts.' (Trans., p. 81.)

"During the summer and early fall of 1917, pending the working out of the elaborate details of the selective service law, it will be remembered that the government was straining every effort to obtain as many recruits and volunteers as possible. It is a matter of common knowledge that recruiting stations were established, posters extensively distributed, public meetings widely held, and a nation-wide appeal made to men of enlistment age to enlist in the Army and Navy. It was while that situation was prevailing that these utterances at the Plaza Block were made.

"(c) Speech at I. W. W. Hall, June 1, 1918.

"Wellington Weiland testified that he was twenty-five years of age; that he entered the military service of the United States on August 6, 1918, and was detailed to the intelligence branch of the service on March 1, 1918; that acting under orders of his superior officer in the intelligence office, Captain Paul Robinson, he had gone to the I. W. W. Hall in Portland on June 1, where at that time he heard Dr. Equi make the following public speech:

"'Well, fellows, I am going to make you a little talk.' She says, 'I have been warned not to talk, but I am going to continue to talk until I am thrown in; that is the way they will shut me up.' She says, 'My partner has been put in for thirty years for talking.' She says, 'This is nothing but a war of capital against labor, a rich man's war.' She says, 'It is not democracy they are attacking at all. I. W. W.ism is

democracy.' Also they were going to get a red flag for the I. W. W. which would have a black cat on it. She says, 'We are going to have that flag and it is the flag we want to stand by.'

"At the time this testimony was introduced, the court expressly limited and qualified the effect of the same, and likewise instructed the jury." (Trans., pp. 141-144.) . . .